No. 15-6418

IN THE
Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Johnson is a substantive rule under this Court's test for a simple reason: No matter what procedures the sentencing court employed, it could not impose the punishment that Petitioner received under the residual clause. If no change in a court's procedures could save the court's ultimate judgment, the rule relied upon to attack that judgment cannot be said to "regulate only the *manner of determining* the defendant's culpability." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). Instead it is a rule of substantive criminal law—the law that "declares what conduct is criminal and prescribes the punishment to be imposed for such conduct." 1 Wayne L. LaFave, *Substantive Criminal Law* § 1.2, at 11 (2003). *Johnson* is one of the clearest examples of such a rule: It changed the permissible outcomes in a criminal proceeding from one range (15 to life) to a wholly distinct range (0 to 10), meaning that *any* person whose enhanced sentence depended upon the residual clause is facing a penalty that could not have been imposed. The recognition of such rules as substantive goes to the heart of habeas corpus: To provide relief for persons whose confinement is not authorized by law.

Ignoring the Court's simple and principled framework, Amicus offers a new framework that looks to whether the "source" of a given constitutional rule is "substantive" because it renders certain conduct "constitutionally immune from punishment." Amicus Br. 1, 21-22. In direct conflict with that test, this Court has given retroactive effect to rules that do not involve any constitutionally immune conduct, *see, e.g.*, *Bousley*

v. United States, 523 U.S. 614, 620-21 (1998); Pet. Br. 30-32, 34-35 (citing additional cases), and has denied retroactive effect to rules that are based on substantive constitutional guarantees, *see, e.g.*, *Sawyer v. Smith*, 497 U.S. 227 (1990) (rule based on Eighth Amendment). Perhaps for that reason, Amicus at times extends her "source" test to encompass constitutional rules that do not render any conduct immune from punishment, such as those based on equal protection—leaving no clear principle to distinguish which sources are procedural and which are substantive.

Even stretched in this manner, Amicus's "source" test cannot account for several well-settled cases and requires an addendum for rules adopted "in furtherance of congressional intent." Amicus Br. 40. Like the "source" test, however, this addendum has nothing to do with whether a person is or is not unlawfully confined. Although Amicus justifies the inquiry into "congressional intent" in terms of special separation-of-powers concerns, a court that imposes a penalty not authorized by any lawful statute exceeds its judicial power at least as much as a court that exceeds the intended scope of a valid statute. Furthermore, giving retroactive effect to rules that narrowly interpret a substantive criminal statute, but not to rules that invalidate the statute, would lead to a highly anomalous result: A decision interpreting a statute to *avoid* vagueness would be retroactive, *see, e.g.*, *Skilling v. United States*, 561 U.S. 358, 368 (2010) (construing a substantive criminal statute narrowly to avoid "a vagueness shoal"), but a decision that goes the additional step of finding the law "'so standardless'"

that it must be invalidated, *see id.* at 415-16 (Scalia, J., concurring), would not.

Since *Johnson* was decided nine months ago, district courts in at least seven circuits have been releasing or resentencing persons under *Johnson* on collateral review. Contrary to Amicus's warnings, the sky has not fallen. And Amicus's argument that those remaining in prison should be required to stay beyond the lawful statutory maximum for their offense—because they had "fair notice" or because *Johnson* may affect other statutes—is an attack on *Johnson* itself, which firmly rejected each of those contentions, not on *Johnson*'s retroactivity.

Retroactivity doctrine serves the fundamental purpose of identifying when a person is facing confinement that was not authorized by the substantive criminal law—an inquiry that has nothing to do with the "source" of a rule or whether Congress *meant* to subject that person to unlawful confinement. *See, e.g.*, *Ex parte Yarbrough*, 110 U.S. 651, 654 (1884). This Court has never in its history held that habeas relief may be denied to a person whose punishment was authorized by an unconstitutional law who properly sought such relief, and it should not do so now.

ARGUMENT

I. The Standards Adopted By This Court, Together With Amicus's Concessions, Dictate That *Johnson* Is Substantive, Not Procedural.

Amicus's brief misconceives this Court's retroactivity jurisprudence. To begin with, although Amicus repeatedly asserts that *Teague* created a general bar to retroactivity, subject to "two narrow exceptions," Amicus Br. 1, 12, 18, 49, this Court has repudiated that understanding, *see, e.g.*, *Schriro*, 542 U.S. at 352 n.4. Under this Court's precedents, *Johnson* is retroactive unless Amicus can show that it falls within *Teague*'s "bar on retroactive application of procedural rules." *Id.*

1. "Procedural rules," this Court recently explained, are those that "enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (quoting *Schriro*, 542 U.S. at 353). Accordingly, the Court applies a simple test to determine whether a rule is procedural: If a court had employed "'impeccable factfinding procedures'" and "flawless sentencing procedures," would the judgment reached be a permissible outcome? *Id.* (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724 (1971) (Harlan, J.)). If yes, the rule is procedural and subject to *Teague*'s bar, unless it is a "watershed" rule.

Amicus does not dispute that by holding the residual clause facially unconstitutional, *Johnson* barred any court from imposing punishment under it, no matter what procedures the court employs. Amicus

Br. 24-25. Based on that concession alone, *Johnson* cannot be a "procedural" rule. Amicus's conclusion that *Johnson* is "procedural" must instead turn on the novel notion that "procedural rules" are those grounded in "process-based values," Amicus Br. 14—a notion that lacks any relation to the purposes of habeas review and is unworkable, *see infra* Part II.

2. It is equally clear under this Court's retroactivity jurisprudence that *Johnson* is a substantive rule. That definition is also straightforward: "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353.[1] "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Id.* at 352 (quoting *Bousley*, 523 U.S. at 620); *Montgomery*, 136 S. Ct. at 734. Amicus does not dispute that *Johnson* "necessarily carr[ies] a significant risk" that a defendant is imprisoned without the authority of a valid statute. Indeed, she does not once mention the Court's "significant risk" standard, which flatly contradicts her assertion that an "effects-based analysis is inappropriate" when assessing a rule's retroactivity. Amicus Br. 41 n.9. Because *Johnson* altered the lawful

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[1] Amicus asserts that this definition is merely an "out-of-context fragment[]" because it makes no reference "to congressional intent." Amicus Br. 42. But this Court has never suggested that the character of a rule turns on "congressional intent"—a restriction that would be arbitrary and unworkable, *see infra* Part II.C.

range of sentences for persons whose sentences depended on the residual clause—from 15 years' to life imprisonment, to 0 to 10 years' imprisonment—those persons necessarily "face[d] a punishment that the law cannot impose." *Schriro*, 542 U.S. at 352. Accordingly, *Johnson* is a substantive rule of criminal law.

Amicus argues that the Court's framework would lead to retroactivity "*whenever* [this Court] deems a law 'unconstitutional.'" Amicus Br. 16, 34. That is wrong. Under the principles above, only the narrowing or invalidation of "*a substantive federal criminal statute*"—i.e., a statute that defines the criminal proscriptions and/or punishments to which persons are subject—is retroactive. *Bousley*, 523 U.S. at 620 (emphasis added); *Montgomery*, 136 S. Ct. at 731 ("A penalty imposed *pursuant to an unconstitutional law* is no less void because the prisoner's sentence became final before the law was held unconstitutional." (emphasis added)). Such rules go directly to "the doctrinal underpinnings of habeas review," which serve to ensure that there is some valid legal basis for a person's ongoing confinement. *Bousley*, 523 U.S. at 621. The invalidation of a criminal statute that governs trial procedure, on the other hand, is procedural and nonretroactive. *See, e.g.*, *Schriro*, 542 U.S. at 354 (invalidation of law requiring judge to find aggravating factors is procedural because "the range of conduct punished by death in Arizona was the same before ... as after").[2]

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[2] Indiana's amicus brief incorrectly suggests that retroactivity will somehow affect AEDPA's procedural requirements. *See* Br. of

In arguing that *Lambrix v. Singletary*, 520 U.S. 518 (1997), is inconsistent with the principles above, Amicus misstates the facts of *Lambrix* and *Espinosa v. Florida*, 505 U.S. 1079 (1992). Both cases involved Florida's death penalty scheme, under which a jury was instructed to weigh statutory aggravating and mitigating circumstances and then render an "advisory sentence" of life imprisonment or death. *Lambrix*, 520 U.S. at 525-26. Whether a jury recommended life or death, the trial court then conducted an independent weighing of the aggravating and mitigating circumstances, giving "great weight" to the jury's advisory sentence. *Id.* In both *Espinosa* and *Lambrix*, the trial court had imposed death based on an appropriately narrowed construction of the "especially heinous, atrocious, or cruel" aggravating factor. *Id.* at 526, 532 & n.4; *Espinosa*, 505 U.S. at 1082. *Espinosa* held that failure to instruct the jury as to the narrowing construction of the aggravating factor "tainted the trial court's sentence because the trial court gave deference to the jury verdict." *Lambrix*, 520 U.S. at 528. Thus, *Espinosa did not* "invalidate[] an aggravating factor," Amicus Br. 28; it held that an improperly instructed jury's recommendation might indirectly affect a trial court's conclusion that death—a concededly lawful outcome—was appropriate. *Lambrix*, 520 U.S. at 525-28. Because the error in

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Indiana et al. 12-13. A claim seeking the benefit of a retroactive rule is equally subject to AEDPA's procedural hurdles, including, in the case of state prisoners, exhaustion of state remedies and demonstrating a violation of "clearly established" federal law under 28 U.S.C. § 2254(d)(1).

Espinosa concerned only the processes for reaching the trial court's ultimate determination, and not the defendant's eligibility for the punishment he received notwithstanding those processes, *Lambrix* held that *Espinosa* was a procedural rule that is not retroactive. *Id.* at 539.

This Court's precedents thus dictate that *Johnson* is a substantive rule that should apply retroactively.

II. The Court Should Not Abandon Its Straightforward and Principled Approach In Favor Of Amicus's Novel "Source" And "Congressional Intent" Tests.

Amicus's proposal would abandon the Court's principled approach and determine whether a rule is "substantive" based on an inquiry that has nothing to do with whether a person's punishment was authorized by a "substantive federal criminal statute." *Bousley*, 523 U.S. at 620. Instead, Amicus's test is based on "the constitutional *source*" of a new rule. Amicus Br. 30. To apply this test, one must identify the "source" of a constitutional rule (at some undefined level of generality) and then determine whether that particular provision of the Constitution (or subpart thereof) represents a "substantive categorical guarantee"—perhaps, though not necessarily, because it renders certain conduct "constitutionally immune from punishment." *Id.* at 1, 14, 21-22. However, because this "source" test cannot accommodate several of this Court's settled precedents, Amicus devises an ad hoc "separate subcategory" for rules adopted "in furtherance of congressional intent," which would automatically be deemed "substantive." *Id.* at 40.

A. The "Source" Test Has No Foundation In Principles Or Precedents Related To Habeas Corpus.

Amicus derives the "source" test principally from a passage in Justice Harlan's *Mackey* opinion explaining that nonretroactivity would be appropriate only in the case of certain "'procedural due process' rules," as opposed to "'substantive due process' rules." *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring); Amicus Br. 20. However, Justice Harlan specifically defined the "'procedural due process' rules [he had] in mind," as a class of rules whose defining feature was not their source, but that they were "*applications* of the Constitution *that forbid the Government to utilize certain techniques or processes* in enforcing concededly valid societal proscriptions on individual behavior." *Mackey*, 401 U.S. at 692 (emphasis added). Moreover, Justice Harlan explained, the same rule can "have both procedural and substantive ramifications, as [he] ha[d] used those terms," *id.* at 692 n.7—a notion that is incompatible with Amicus's contention that a rule's character turns on its source, not on its effects.

Indeed, the "source" test directly conflicts with the outcomes Justice Harlan reached in *Mackey* and in *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971), which were decided on the same day. Both cases involved the same new rule—that the government cannot compel a person to report gambling activities through the tax law—which stemmed from the same "source," the Fifth Amendment right against self-incrimination. In *Coin & Currency*, the defendant

claimed that this rule rendered unlawful his conviction for failing to report gambling activities. 401 U.S. at 716-17. Writing for the Court, Justice Harlan held the rule retroactive because the claim was not "concerned with the implementation of a procedural rule," but with punishment that could not be imposed in the first place. *Id.* at 723-24. In *Mackey*, the petitioner invoked the same rule to argue that his tax returns should have been excluded at trial. 401 U.S. at 701. There, Justice Harlan concluded that retroactivity was *not* warranted because the rule concerned only "the procedures utilized in procuring [the] conviction." *Id.* It is difficult to imagine a better controlled experiment to refute the hypothesis that a rule's retroactivity depends on its source rather than its effect.

Although Amicus repeatedly states that this Court's post-*Teague* cases have "consistently focused on the constitutional source of a new rule," that is incorrect. Amicus Br. 14, 30. To the contrary, in *Teague*, the Court discarded the approach to retroactivity it had adopted in *Linkletter v. Walker*, 381 U.S. 618 (1965), which turned on an "examin[ation of] the purpose" underlying a rule and gave rise to arbitrary and inconsistent results. *Teague v. Lane*, 489 U.S. 288, 302-03 (1989). The Court explained that "'[t]he relevant frame of reference ... is *not the purpose of the new rule whose benefit the [defendant] seeks*, but instead the purposes for which the writ of habeas corpus is made available.'" *Id.* at 306 (quoting *Mackey*, 401 U.S. at 682 (alteration in original)).

The only post-*Teague* citation Amicus offers to support her "source" test is a single sentence from

Schriro that does not actually support her proposition. Amicus Br. 43. In *Schriro*, this Court reasoned that *Ring v. Arizona*, 536 U.S. 584 (2002), "did not alter the range of conduct Arizona law subjected to the death penalty" because "[i]t could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize." 542 U.S. at 353. Contrary to Amicus's inference, this reasoning confirms that a rule's retroactivity turns on whether its effect is to alter the range of circumstances subject to penalty. The Court's reasoning that *Ring* did not have that effect because the constitutional right upon which it relied "could not" have that effect is unremarkable. Here, on the other hand, no one disputes that *Johnson* facially invalidated the residual clause, changing the permissible range of punishment from 15 years to life to 0 to 10 years.

The few post-*Teague* cases addressing rules grounded in the Due Process Clause also contradict Amicus's assertion that retroactivity turns on whether such rules are grounded in procedural or substantive due process. In *Goeke v. Branch*, 514 U.S. 115 (1995) (per curiam), for instance, the Eighth Circuit had granted habeas on the basis that Missouri's fugitive dismissal law "violated the defendant's substantive rights under the Fourteenth Amendment." 514 U.S. at 117. Assuming the legitimacy of that substantive due process rule, this Court reversed, holding that it was

procedural under *Teague* and thus not retroactive—a result that cannot be squared with Amicus's test.[3]

Indeed, this Court's post-*Teague* cases confirm that a rule's "source" need not even lie within the Constitution. *Bousley*, 523 U.S. at 620-21. What unifies all substantive rules is their particular "ramification": They "necessarily carry a significant risk" that a defendant suffered a punishment that could not have been lawfully imposed upon him. *Id.* That, the Court has explained, is why conduct-protecting rules are classified as substantive and also why rules "holding that a substantive federal criminal statute does not reach certain conduct" are substantive. *Id.* It is why *Johnson*—which altered the lawful range of punishment from 15 years to life to 0 to 10 years—is substantive as well. *See id.*; *Schriro*, 542 U.S. at 351-52.

B. Amicus Cannot Offer A Coherent Theory For Discerning Which "Sources" Produce Substantive Rules.

Amicus proceeds as though the distinction between a procedural and a substantive "source" is self-evident, offering little direction as to how the Court would sort between the two. In fact, this approach would require

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[3] None of the remaining post-*Teague* cases addressing rules grounded in the Due Process Clause considered relevant whether the rule derived from substantive or procedural due process. They instead considered whether the rule had the effect of "'decriminaliz[ing]' any class of conduct" or preventing certain punishment. *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993); *Gray v. Netherland*, 518 U.S. 152, 170 (1996); *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997).

the Court to overrule well-settled case law and create new, arbitrary distinctions between constitutional rights.

At several points, Amicus suggests that the "source" inquiry is simple: Does a given constitutional provision "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"? *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692-93); *see* Amicus Br. 1, 12-13, 44. This theory rests on an implausibly narrow reading of Justice Harlan's opinions, *see* Pet. Br. 29-35, and, like the "source" test itself, it is irreconcilable with this Court's recognition that decisions narrowing a substantive criminal statute's scope are retroactive. *Bousley*, 523 U.S. at 620-21. Adopting Amicus's rule would entail overruling a heap of other cases as well.

For example, this Court has held that numerous rules grounded in the Eighth Amendment are not retroactive because they affect only trial procedures. *See, e.g.*, *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); *Sawyer*, 497 U.S. 227; *Graham v. Collins*, 506 U.S. 461 (1993); *Lambrix*, 520 U.S. 518; *Beard v. Banks*, 542 U.S. 406 (2004). Faithfully applied, Amicus's test would hold that these rules—whose source is undoubtedly a substantive guarantee—are retroactive. The same problem arises regarding other constitutional rights that place conduct beyond the government's power to proscribe. *See, e.g.*, *supra* 9-10 (discussing the contrasting results of *Mackey* and *Coin & Currency*); *Dawson v. Delaware*, 503 U.S. 159, 160 (1992)

(admission of evidence of gang membership at capital sentencing barred by First Amendment).

Perhaps for this reason, at other points in her brief, Amicus does not adhere to the "power to proscribe" interpretation of her "source" rule. For instance, Amicus takes for granted that certain Eighth Amendment rules would be found "procedural" in source. *See* Amicus Br. 29, 31. But how is one to determine whether the relevant facet of a quintessential substantive protection, like the right against cruel and unusual punishment, is a "procedural" source? Logically, the answer should be by asking whether the rule has the effect of regulating "only the *manner of determining* the defendant's culpability," *Schriro*, 124 U.S. at 353—a principle that Amicus cannot adopt because it would amount to abandoning the "source" test altogether.

This fundamental problem with Amicus's "source" test is also demonstrated by her arbitrary assessment that certain constitutional rights have a substantive "source" even though they do not make any conduct immune from regulation. The Equal Protection Clause, for instance, does not place conduct beyond the power of the state to criminalize, provided that the state exercises its power evenhandedly—a point that both Petitioner and the Government made and Amicus does not dispute. Pet. Br. 34; US Br. 34. If Amicus were true to her "power to proscribe" theory, she would thus conclude that equal-protection-based rules cannot be substantive. Yet Amicus insists, without explanation, that cases like *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Crowley v. Christensen*, 137 U.S. 86 (1890),

involved the "*substantive* right to equal protection." Amicus Br. 45.

Many other constitutional provisions also protect individual rights not by limiting *what* conduct the government may proscribe but by regulating *how* it may do so. *See, e.g.*, U.S. Const. art. I, § 9, cl. 3 (ex post facto); *id.* (bill of attainder); *id.* amend. V (double jeopardy). Which of these other provisions would Amicus selectively recognize as substantive in "source"?

Amicus's theory also conflicts with *Ex parte Siebold*, 100 U.S. 371 (1880), which, this Court recently explained, "addressed why substantive rules must have retroactive effect regardless of when the defendant's conviction became final." *Montgomery*, 136 S. Ct. at 730; *see Mackey*, 401 U.S. at 693 n.8. Although Amicus suggests that *Siebold* involved Congress's power to proscribe conduct, Amicus Br. 44-45, the *Siebold* petitioners *conceded* that their underlying conduct—"the offence commonly known as 'stuffing the ballot-box'"—was not constitutionally protected conduct. 100 U.S. at 379. They argued only that the statute of conviction was unconstitutional because the Elections Clause did not give Congress the "power to make partial regulations" governing elections. *Id.* at 382. By reading Justice Harlan's category of substantive rules as limited to constitutional immunities, Amicus implies that Justice Harlan sought to overturn the very historical precedent upon which he relied—and upon which this Court recently relied, notwithstanding the

same criticisms Amicus raises here. *See Montgomery*, 136 S. Ct. at 748-49 (Thomas, J., dissenting).[4]

The difficulties in applying the "source" test are manifest here. Contrary to Amicus's assertions, it is far from clear that vagueness is rooted in "process-based values." Amicus Br. 14. While Amicus attempts to reduce vagueness to a right to "notice," *id.* at 25-26, this Court has repeatedly said otherwise: "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Gougen*, 415 U.S. 566, 574 (1974)); *see also* M. Cherif Bassiouni, *Substantive Criminal Law* 55 (1978). Vagueness doctrine affords the substantive guarantee that persons will not be deprived of "life, liberty, or property under a criminal law ... so standardless that it

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[4] Amicus's attempt to discount historical precedents is unavailing. For example, she cites this Court's statement in *Montgomery* that *Siebold* "does not directly control," Amicus Br. 48, but that statement was made with respect to the jurisdictional issue in *Montgomery*, which *Siebold* (a federal case) could not have addressed. *See* 136 S. Ct. at 731. More broadly, the extensive historical record recounted in Petitioner's opening brief establishes that habeas has always been open to claims of the kind at issue here without regard to retroactivity. Pet. Br. 30-32 & n.12. The limit on retroactivity urged by Justice Harlan and adopted in *Teague* was, as Amicus acknowledges, a response to the recognition of new procedural protections "in the 1950's and 1960's" (Amicus Br. 19), which gave rise to claims that historically would not have been cognizable in habeas at all. It was not intended to take away the core instances for which "the writ has historically been available," *Mackey*, 401 U.S. at 682-83, 692-93.

invites arbitrary law enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); *see Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("the substantive due process guarantee protects against government power arbitrarily and oppressively exercised").

This more complete understanding of vagueness doctrine makes Amicus's distinction between equal protection and vagueness untenable: If a right precluding administration of the law "with an evil eye and an unequal hand" (*Yick Wo*, 118 U.S. at 373-74) is a substantive "source," why not a right precluding administration in a manner that is "so standardless that it invites arbitrary enforcement" (*Johnson*, 135 S. Ct. at 2556)? *See also* 1 LaFave, *supra*, § 2.3(c), at 150 ("The objection to a vague statute, then, is akin to a claim of denial of equal protection in law enforcement[.]"). This distinction is particularly difficult to comprehend in the context of the Fifth Amendment's Due Process Clause, which is the source of both equal protection and vagueness challenges to federal laws.

In sum, Amicus's rigid "constitutional immunity" formulation cannot account for this Court's precedent and, upon abandoning it, she leaves the Court with no discernible rule for distinguishing between substantive and procedural sources at all.

C. The "Congressional Intent" Test Similarly Lacks Any Basis In Principle Or Precedent And Would Lead To Arbitrary Outcomes.

In *Bousley* and in *Schriro*, the Court made perfectly clear why a decision narrowing the scope of a criminal

statute is a substantive rule: It alters the substantive criminal law. *Bousley*, 523 U.S. at 620-21; *Schriro*, 542 U.S. at 353. Amicus cannot accept that account, however, because it would plainly dictate that *Johnson* is substantive as well. *See supra* Part I.

Instead, Amicus says that statutory holdings are retroactive because they are "in furtherance of congressional intent." Amicus Br. 40. This Court has never adopted this rationale—in fact, it does not appear that *any* court has adopted this rationale. That is for good reason: When a person is subject to confinement that is not authorized by a valid law, that confinement is unlawful irrespective of what Congress *meant* to do.

Amicus justifies her "congressional intent" subcategory on the basis of a special "separation-of-powers" rationale. Amicus Br. 40. But the separation-of-powers concerns implicated when a court imposes punishment that exceeds the scope of a valid statute are no greater than when a court imposes punishment that is not authorized by *any* valid statute. *See Bousley*, 523 U.S. at 620-21 ("[I]t is only Congress, and not the courts, which can make conduct criminal."). Indeed, separation-of-powers concerns are particularly acute in the context of vagueness. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (explaining that "[a] vague law impermissibly delegates basic policy matters" to courts); *Kolender*, 461 U.S. at 358 n.7.

Amicus's "congressional intent" test also yields untenable results. "[B]efore striking a federal statute as impermissibly vague, [the Court] consider[s]

whether the prescription is amenable to a limiting construction." *Skilling*, 561 U.S. at 405. In *Skilling*, for example, the Court avoided invalidating the honest-services statute on vagueness grounds by limiting the statute to its "core" conduct of "*at least* bribes and kickbacks." *Id.* at 408. Under Amicus's theory, *Skilling* (unlike *Johnson*) would thus be a substantive rule, because it "interpreted" the statute rather than invalidating it. Yet that would be anomalous. It would mean that so long as the Court leaves one application standing, narrowing a statute will have retroactive effect and all persons outside the "core" will be eligible for relief; but if the Court goes further and invalidates even the final core application (as three Justices would have done in *Skilling*), its holding will *not* be retroactive to those very same people. Such arbitrariness is untenable.

Additional problems with Amicus's "congressional intent" test are apparent from her use of it as a catch-all for non-statutory decisions that she cannot otherwise account for. As Petitioner's opening brief explains, the Court has always granted habeas relief to persons whose punishment could not constitutionally have been imposed, regardless of whether the constitutional rule was settled when their convictions became final. Pet. Br. 32. In *In re Medley*, 134 U.S. 160 (1890), for instance, the Court granted habeas relief to a prisoner who had been sentenced to solitary confinement because that punishment violated the Ex Post Facto Clause. Amicus claims, without explanation, that such cases are justified under the 'congressional intent' test. Amicus Br. 46 n.10. That

characterization of *Medley* is implausible: The Court specifically held that the punishment "to which the prisoner was subjected by the statute of Colorado ... is forbidden by this provision of the constitution of the United States." 134 U.S. at 171. In Amicus's terms, therefore, the Court "recognized [Colorado's] intent but *overrode* it." Amicus Br. 41. The arbitrary classification of such decisions further confirms the indeterminacy of Amicus's system.

III. Amicus Overstates The Consequences Of Concluding That *Johnson* Is Retroactive.

Since *Johnson* was decided nine months ago, the First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have been releasing or resentencing persons under *Johnson* on collateral review. *See* Pet. Br. 11 nn.3-4. Those circuits alone accounted for approximately 70% of ACCA-enhanced defendants in 2014.[5] In many cases, petitioners and the government have simply filed joint emergency motions for relief, leading to prompt release from unlawful confinement or resentencing.[6] *See also* Amicus Br. of Scholars of Fed. Courts 27-33 (describing the limited burden caused by *Johnson*'s retroactivity). Contrary to Amicus's warning, the sky has not fallen.

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[5] U.S. Sentencing Comm'n, *"Crime of Violence" and Related Issues Public Data Briefing*, at 27 (Nov. 10, 2015), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20151105/COV_briefing.pdf.

[6] *See* Petition for Writ of Habeas Corpus 12-13, *In re Sharp*, No. 15-646 (U.S. Nov. 16, 2015) (citing numerous examples across these circuits).

Amicus argues that persons who have not yet been afforded relief under *Johnson* should be required to carry out sentences exceeding the lawful statutory maximum for their offense because affording them relief would lead to "problematic consequences." Amicus Br. 49. The implications of that argument are extremely troubling. Society has no interest "in permitting the criminal process to rest at a point where it ought properly never to repose." *Montgomery*, 136 S. Ct. at 732 (quoting *Mackey*, 401 U.S. at 693).

In any case, Amicus's arguments are an attack on *Johnson* itself, not its retroactivity. First, Amicus argues that "many" of the predicate convictions to which the residual clause was applied did not involve the "notice problems at issue in *Johnson*." Amicus Br. 50. But that contradicts *Johnson*, which invalidated the residual clause precisely because it was "shapeless," "'nearly impossible to apply,'" and "'at best could be only guesswork.'" 135 S. Ct. at 2560. Moreover, the same decisions of this Court that Amicus relies upon to show "fair notice," Amicus Br. 50, were described by *Johnson* as "confirm[ing] its hopeless indeterminacy," "offer[ing] no help at all," and leaving "'a black hole of confusion and uncertainty.'" 135 S. Ct. at 2558, 2562. Furthermore, the Court explained that the "easy" examples cited by the dissent, and echoed by Amicus here, in fact "turn out not to be so easy after all." *Id.* at 2560-61.

Second, Amicus argues that *Johnson* might be applied to strike down other statutes, citing the same statutes that the government and dissent cited in *Johnson* itself—an argument that the Court, again,

rejected. *Id.* at 2561 (distinguishing such statutes because they do not tie the standard "to a confusing list of examples" or "to an idealized ordinary case of the crime").[7]

IV. The Court Should Reject Amicus's Attempt To Assert Nonjurisdictional Defenses On Behalf Of The Government.

A. Amicus's Procedural Default Argument Is Meritless.

Amicus argues that the Court should affirm on the basis of procedural default—a nonjurisdictional affirmative defense, *Trest v. Cain*, 522 U.S. 87, 89 (1997), that the government has waived in this case. That would be an extraordinary departure from this Court's precedent.

Petitioner argued vagueness in his *pro se* § 2255 motion, in several *pro se* filings on appeal, and in his

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[7] Amicus exaggerates the degree to which *Johnson*'s retroactivity entails the same for the career offender guidelines. Several circuits have held, as a threshold matter, that vagueness does not even apply to the sentencing guidelines. *See, e.g.*, *United States v. Matchett*, 802 F.3d 1185, 1189 (11th Cir. 2015); *United States v. Tichenor*, 683 F.3d 358, 363-66 (7th Cir. 2012). And, with respect to retroactivity, some courts have distinguished the guidelines because "[u]nlike the ACCA—a statute that shifts the defendant's penalty range and minimum and maximum terms of imprisonment—the Guidelines merely guide the execution of a court's discretion in selecting the appropriate sentence from within an otherwise stagnate range of lawful penalties." *Frazier v. United States*, Nos. 1:14-CV-134-CLC, 2016 WL 885082, at *5-6 (E.D. Tenn. Mar. 8, 2016), *appeal docketed*, No. 16-5299 (6th Cir. Mar. 15, 2016).

certiorari briefing, Pet. Br. 7-10, and the government made the deliberate decision not to assert procedural default at each stage—and, again, in its merits brief before this Court. In light of that deliberate waiver, this Court lacks authority to raise the defense *sua sponte*. *See Wood v. Milyard*, 132 S. Ct. 1826, 1833-34 (2012).

Even had the government asserted this defense, Petitioner would be excused from any default based on *both* (1) cause and prejudice, *see Reed v. Ross*, 468 U.S. 1, 17 (U.S. 1984) (cause is satisfied when a new rule comes by way of a "decision of this Court" that "explicitly overrule[s] one of [its] precedents"), *and* (2) the actual innocence gateway, *see Bousley*, 523 U.S. at 623; Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 Colum. L. Rev. Sidebar 55, 72 (2015) (courts have "generally coalesced around the idea that a defendant would be actually innocent if a sentencing error resulted in the defendant receiving a sentence above the statutory maximum").

B. Amicus's Elements Clause Argument Is Meritless.

Amicus's argument that the Court can affirm under the elements clause is also unfounded. The government does not contest that it failed to raise this nonjurisdictional issue at the certiorari stage. *See* Pet. Br. at 35-36. Moreover, reasonable jurists could debate whether Petitioner's 1996 Florida robbery convictions qualify under the elements clause. The Eleventh Circuit conceded as much when, on direct appeal, it reviewed Florida law at the time of Petitioner's

convictions and concluded that "[a]rguably the elements clause would not apply." JA 117a.

In any case, Petitioner's Florida robbery convictions do not qualify under the elements clause because they did not require as an element the use of "violent force." *Johnson (Curtis) v. United States*, 559 U.S. 133, 140-41 (2010). As the Eleventh Circuit observed and the government conceded at sentencing, Petitioner was convicted "at a time when the controlling Florida Supreme Court authority held that 'any degree of force'" sufficed to commit robbery, including the mere snatching of an object from a victim's person without any resistance. JA 113a-115a & n.32 (explaining that in the district where Petitioner was convicted the force could be "ever so little"); JA 152a. In other cases, the government has conceded that this form of Florida robbery cannot qualify under the elements clause. *See* Government's Response to § 2255 Motion, at 9-10, *Dieujuste v. United States*, No. 9:15-cv-80618-KLR (S.D. Fla. Aug. 31, 2015), ECF No. 17.

Amicus's argument is premised on *Robinson v. State*, 692 So. 2d 883 (Fla. 1997), which held that robbery can be committed only upon a showing of "resistance by the victim." *Id.* at 886. As the Eleventh Circuit explained on direct appeal, however, *Robinson* was decided after Petitioner's convictions and altered prior controlling authority that "any degree of force" sufficed. JA 113a-115a. In any case, even after *Robinson*, Florida robbery does not require violent force. *See, e.g., Sanders v. State*, 769 So. 2d 506, 507 (Fla. 5th Dist. Ct. App. 2000) (force required to quickly open a victim's hand and snatch cash is sufficient); Pet.

Br. 37 (explaining additional ways in which a conviction for Florida robbery can be obtained without violent force).

Plainly, at a minimum, reasonable jurists could debate whether Petitioner's 1996 Florida robbery convictions qualify under the elements clause and therefore reversal is warranted.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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